

UNITED STATES DISTRICT COURT  
DISTRICT OF NEVADA

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IN RE ALLIED NEVADA GOLD CORP.,  
SECURITIES LITIGATION

3:14-CV-00175-LRH-WGC

ORDER

Before the court is Defendants' Motion to Dismiss. ECF No. 103.<sup>1</sup> Lead Plaintiff Andrey Slomnitsky ("Plaintiffs") filed an Opposition (ECF No. 109), to which Defendants replied (ECF No. 110). Defendants also filed a Request for Judicial Notice. ECF No. 104. Oral argument was heard before the Court on March 30, 2016. ECF No. 117.

**I. Facts and Procedural History**

This is a federal securities class action on behalf of investors who purchased stock in Defendant Allied Nevada Gold Corporation ("Allied") between January 18, 2013, and August 5, 2013. One of Allied Nevada's central operations recovers gold and silver from oxide ores using a technique ("heap leaching") that extracts ore from an open pit, crushes it, and places it on impermeable leach pads where the ore is doused with a weak cyanide solution that dissolves the gold from the ore. One of the company's three leach pads, the Lewis leach pad, was beset with operational difficulties between January 18, 2013, and August 5, 2013, inclusive (the "Class

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<sup>1</sup> Refers to the Court's docket number.

1 Period”). Allied issued a variety of press releases and financial information<sup>2</sup> during the Class  
2 Period and also conducted several conference calls from January to May that Plaintiffs allege  
3 contained a number of materially false and misleading statements concerning the operations of  
4 the Lewis leach pad, Allied’s cash position and access to capital, the expansion of the Hycroft  
5 mine, and Allied’s favorable financial guidance. Plaintiffs then allege that the truth was slowly  
6 revealed from May until August, beginning with Allied’s April 30, 2013 press release; Form 10-  
7 Q; and May 1, 2013 conference call, which announced Allied’s planned secondary public  
8 offering (“SPO”). On May 2, 2013, Allied filed an automatic shelf registration statement on  
9 Form S-3 with the Securities Exchange Commission (“SEC”). On May 9, 2013, Allied filed an  
10 amendment to the registration statement, offering to sell fourteen million shares of Allied stock  
11 in a SPO. On May 17, 2013, Allied announced the closing of its sale of fourteen million shares  
12 in the SPO at \$10.75 per share. On July 8 and 22, 2013, Allied released two further press  
13 releases which Plaintiffs contend further exposed the truth. On August 6, 2013, Allied issued a  
14 press release and held a conference call in which Plaintiffs contend the truth was finally  
15 completely exposed. Allied announced that its production costs had increased dramatically and  
16 would continue to rise because of the operating defects at the Lewis leach pad. Allied also stated  
17 that it would indefinitely suspend its planned expansion as a result of the Lewis leach pad  
18 deficiencies. Following this announcement, Allied’s stock dropped significantly, from \$5.90 per  
19 share at the close of trading on August 5, to \$3.73 per share at the close of trading on August 7.

20 On April 3, 2014, the first complaint was filed in this action. ECF No. 1. On  
21 November 7, 2014, the case was consolidated, and Andrey Slomnitsky was named lead plaintiff.  
22 ECF No. 59. On March 10, 2015, Allied filed for Chapter 11 bankruptcy. ECF No. 95. On  
23 May 1, 2015, an amended complaint was filed. ECF No. 98. The consolidated complaint  
24 alleged two causes of action: (1) Violation of Section 10(b) of the Exchange Act and Rule 10b-5  
25 and (2) Violation of Section 20(a) of the Exchange Act. On September 29, 2015, Defendants  
26 filed a motion to dismiss and a request for judicial notice. ECF No. 103 and 104. On

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27 <sup>2</sup> Specifically, Allied’s January 18, 2013 press release and conference call; February 22, 2013 press release;  
28 February 25, 2013 press release and conference call; 2012 Form 10-K; March 21, 2013 press release; March 27,  
2013 press release; April 8, 2013 press release; and April 9, 2013 conference call.

December 5, 2015, Plaintiffs filed a response to the motion to dismiss. ECF No. 109. On February 1, 2016, Defendants filed a reply. ECF No. 110.

## II. Legal Standard

Rule 8(a)(2) of the Federal Rules of Civil Procedure requires a complaint to include a “short and plain statement of the claim showing that the pleader is entitled to relief.” Fed.R.Civ.P. 8(a)(2). A complaint that fails to meet this standard may be dismissed pursuant to Federal Rule of Civil Procedure 12(b)(6). Dismissal under Rule 12(b)(6) may be based on either (1) the “lack of a cognizable legal theory,” or (2) “the absence of sufficient facts alleged under a cognizable legal theory.” *Balistreri v. Pacifica Police Dep’t*, 901 F.2d 696, 699 (9th Cir. 1990). In considering whether the complaint is sufficient to state a claim, the court accepts as true all of the factual allegations contained in the complaint. *Ashcroft v. Iqbal*, 556 U.S. 662, 677 (2009). However, the court need not “accept as true allegations that contradict matters properly subject to judicial notice or by exhibit” or “allegations that are merely conclusory, unwarranted deductions of fact, or unreasonable inferences.” *In re Gilead Scis. Sec. Litig.*, 536 F.3d 1049, 1055 (9th Cir.2008) (internal quotation marks omitted). While a complaint need not allege detailed factual allegations, it “must contain sufficient factual matter, accepted as true, to ‘state a claim to relief that is plausible on its face.’” *Iqbal*, 556 U.S. at 677 (quoting *Bell Atl. Corp. v. Twombly*, 550 U.S. 544, 570 (2007)). A claim is facially plausible when it “allows the court to draw the reasonable inference that the defendant is liable for the misconduct alleged.” *Id.*

Because Plaintiffs have brought securities fraud claims under the PSLRA, Rules 8 and 12(b)(6) are not the only governing legal standards. Plaintiffs must also satisfy the heightened pleading standards set forth by Rule 9(b) of the Federal Rules of Civil Procedure and by the PSLRA itself. *Zucco Partners*, 552 F.3d 981, 990 (9th Cir. 2009). Rule 9(b) of the Federal Rules of Civil Procedure requires a plaintiff alleging fraud or mistake to “state with particularity the circumstances constituting fraud or mistake.” Fed.R.Civ.P. 9(b); *Nursing Home Pension Fund, Local 144 v. Oracle Corp.*, 380 F.3d 1226, 1230 (9th Cir. 2004). In addition, the PSLRA requires a plaintiff alleging securities fraud to “plead with particularity both falsity and scienter.” *Zucco Partners*, 552 F.3d at 990. With respect to falsity, the complaint must “specify each

statement alleged to have been misleading, [and] the reason or reasons why the statement is misleading.” 15 U.S.C. § 78u-4(b)(1). To the extent an allegation is based on information and belief, “the complaint shall state with particularity all facts on which that belief is formed.” *Id.* “A litany of alleged false statements, unaccompanied by the pleading of specific facts indicating why those statements were false, does not meet this standard.” *Metzler Inv. GMBH v. Corinthian Colleges, Inc.*, 540 F.3d 1049, 1070 (9th Cir. 2008). With respect to scienter, the complaint must “state with particularity facts giving rise to a strong inference that the defendant acted with the required state of mind.” 15 U.S.C. § 78u-4(b)(2). That is, plaintiffs must plead with particularity the facts evidencing “the defendant's intention ‘to deceive, manipulate, or defraud.’” *Tellabs, Inc. v. Makor Issues & Rights, Ltd.*, 551 U.S. 308, 313 (2007) (quoting *Ernst & Ernst*, 425 U.S. at 194 n.12). To satisfy the rigorous pleading standards of the PSLRA, the complaint's scienter allegations must give rise not simply to a plausible inference of scienter, but rather to an inference of scienter that is “cogent and at least as compelling as any opposing inference of nonfraudulent intent.” *Id.* at 314.

Furthermore, a court may take judicial notice of “records and reports of administrative bodies.” *Interstate Natural Gas Co. v. Southern California Gas Co.*, 209 F.2d 380, 385 (9th Cir. 1953). Under the Federal Rules of Evidence, “[a] judicially noticed fact must be one not subject to reasonable dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot reasonably be questioned.” Fed.R.Evid. 201(b). “A court shall take judicial notice if requested by a party and supplied with the necessary information.” Fed.R.Evid. 201(d).

### **III. Discussion**

#### **A. Judicial Notice**

“Although generally the scope of review on a motion to dismiss for failure to state a claim is limited to the Complaint, a court may consider evidence on which the complaint necessarily relies if: (1) the complaint refers to the document; (2) the document is central to the plaintiffs' claim; and (3) no party questions the authenticity of the copy attached to the 12(b)(6) motion.” *Daniels–Hall v. Nat'l Educ. Ass'n*, 629 F.3d 992, 998 (9th Cir. 2010) (internal

1 quotations and citations omitted). The court may “treat such a document as ‘part of the  
2 complaint, and thus may assume that its contents are true for purposes of a motion to dismiss  
3 under Rule 12(b)(6).’” *Marder v. Lopez*, 450 F.3d 445, 448 (9th Cir. 2006) (quoting *United*  
4 *States v. Ritchie*, 342 F.3d 903, 908 (9th Cir. 2003)). Here, Plaintiffs' Complaint refers to and  
5 quotes from the contents of Allied's January 18, 2013 press release; January 18, 2013 earnings  
6 call; February 22, 2013 press release; February 25, 2013 press release; February 25, 2013  
7 earnings call; 2012 Form 10-K; March 21, 2013 press release; March 27, 2013 press release;  
8 April 8, 2013 press release; April 9, 2013 earnings call; April 30, 2013 press release; Form 10-Q  
9 for the quarter ending March 31, 2013; May 1, 2013 earnings call; Prospectus Statement; July 8,  
10 2013 press release; July 22, 2013 press release; August 6, 2013 press release; and August 6, 2013  
11 earnings call. Moreover, Plaintiffs do not dispute the authenticity of these documents. Therefore  
12 judicial notice of Exhibits A–R is appropriate.

13 Defendants also ask that this Court take judicial notice of Exhibit S, which contains a  
14 graphical representation of the published stock prices for Allied from September 28, 2012,  
15 through August 30, 2013; a table showing the published stock prices for Allied from October 1,  
16 2012, through August 9, 2013; a graphical representation of the published prices for gold from  
17 September 25, 2012, through August 30, 2013, and from June 12, 2009, through August 30,  
18 2013; and tables showing the published prices for gold from October 1, 2012, through  
19 December 31, 2012, and from April 30, 2013, through August 9, 2013. Under Federal Rule of  
20 Evidence 201(b) a Court may take judicial notice of a fact that is “not subject to reasonable  
21 dispute in that it is either (1) generally known within the territorial jurisdiction of the trial court  
22 or (2) capable of accurate and ready determination by resort to sources whose accuracy cannot  
23 reasonably be questioned.” Fed.R.Evid. 201(b). This includes a company's published stock  
24 prices. *In re Homestore.com, Inc. Sec. Litig.*, 347 F. Supp. 2d 814, 817 (C.D. Cal. 2004). It also  
25 includes “publicized commodities prices.” *In re Crude Oil Commodity Futures Litig.*, 913 F.  
26 Supp. 2d 41, 52 (S.D.N.Y. 2012). Further, Plaintiffs have not objected to any of Allied's  
27 exhibits. Therefore, judicial notice of Exhibit S is appropriate.

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**B. Violation of Section 10(b) of the Exchange Act and Rule 10b-5**

Section 10(b) of the Exchange Act of 1934, 15 U.S.C. § 78j(b), makes it unlawful “for any person ... [t]o use or employ, in connection with the purchase or sale of any security ... any manipulative or deceptive device or contrivance in contravention of such rules and regulations as the Commission may prescribe[.]” SEC Rule 10b–5, promulgated under the authority of section 10(b), in turn, provides:

It shall be unlawful for any person ... (a) To employ any device, scheme, or artifice to defraud, (b) To make any untrue statement of a material fact or to omit to state a material fact necessary in order to make the statements made, in light of the circumstances under which they were made, not misleading, or (c) To engage in any act, practice, or course of business which operates or would operate as a fraud or deceit upon any person, in connection with the purchase or sale of any security.

17 C.F.R. § 240.10b–5. The basic elements of a Rule 10b–5 claim, therefore, are: (1) a material misrepresentation or omission of fact, (2) scienter, (3) a connection with the purchase or sale of a security, (4) transaction and loss causation, and (5) economic loss. *See Dura Pharms., Inc. v. Broudo*, 544 U.S. 336, 125 S.Ct. 1627, 1631, 161 L.Ed.2d 577 (2005).

It is well established that claims brought under Rule 10b–5 and section 10(b) must meet the particularity requirements of Federal Rule of Civil Procedure 9(b). *See Semegen v. Weidner*, 780 F.2d 727, 729, 734–35 (9th Cir.1985). Rule 9(b) states that “[i]n all averments of fraud or mistake, the circumstances constituting fraud or mistake shall be stated with particularity. Malice, intent, knowledge, and other condition of mind of a person may be averred generally.” Further, the enactment of the Private Securities Litigation Reform Act (“PSLRA”) in 1995 significantly altered pleading requirements in private securities fraud litigation by amending the 1934 Exchange Act to require that a complaint “plead with particularity both falsity and scienter.” *Gompper v. VISX, Inc.*, 298 F.3d 893, 895 (9th Cir. 2002) (quoting *Ronconi v. Larkin*, 253 F.3d 423, 429 (9th Cir. 2001)); *see also Nursing Home*, 380 F.3d at 1230. A securities fraud complaint must now “specify each statement alleged to have been misleading, the reason or reasons why the statement is misleading, and, if an allegation regarding the statement or omission is made on information and belief, the complaint shall state with particularity all facts on which that belief is formed.” *Gompper*, 298 F.3d at 895 (quoting 15 U.S.C. § 78u–4(b)(1)).

1 The complaint must also “state with particularity facts giving rise to a strong inference that the  
 2 defendant acted with the required state of mind.” *Id.* (quoting 15 U.S.C. § 78u–4(b)(2)); *see also*  
 3 *In re Silicon Graphics Inc. Sec. Litig.*, 183 F.3d 970, 974 (9th Cir. 1999) (facts must come closer  
 4 to demonstrating intent as opposed to mere motive and opportunity). The stricter standard for  
 5 pleading scienter naturally results in a stricter standard for pleading falsity, because “‘falsity and  
 6 scienter in private securities fraud cases are generally strongly inferred from the same set of  
 7 facts,’ and the two requirements may be combined into a unitary inquiry under the PSLRA.” *In*  
 8 *re Vantive Corp. Sec. Litig.*, 283 F.3d 1079, 1091 (9th Cir. 2002) (quoting *Ronconi*, 253 F.3d at  
 9 429). Thus, the complaint must allege that the defendants made false or misleading statements  
 10 either intentionally or with deliberate recklessness. *Silicon Graphics*, 183 F.3d at 974.

# 11 **1. Material Misrepresentation or Omission of Fact**

## 12 **a. Falsity**

13 To assert a claim under the PSLRA, the plaintiff must plead with particularity, *inter alia*,  
 14 the element of falsity. *Zucco Partners*, 552 F.3d at 990–91. “The PSLRA has exacting  
 15 requirements for pleading ‘falsity.’” *Metzler*, 540 F.3d at 1070. To satisfy these “exacting  
 16 requirements,” a plaintiff must plead “specific facts indicating why” the statements at issue were  
 17 false. *Id.*; *Ronconi*, 253 F.3d at 434 (“Plaintiffs’ complaint was required to allege specific facts  
 18 that show” how statements were false); *see also In re Stratosphere Corp. Sec. Litig.*, No. CV–S–  
 19 96–708–PMP, 1997 WL 581032, at \*13 (D. Nev. May 20, 1997) (to plead falsity, plaintiff must  
 20 provide “evidentiary facts contemporary to the alleged false or misleading statements from  
 21 which this court can make inferences permissible under Rule 9(b).”). Moreover, to be  
 22 actionable, a statement must be false “at [the] time by the people who made them.” *Ronconi*,  
 23 253 F.3d at 430. “The fact that [a] prediction proves to be wrong in hindsight does not render  
 24 the statement untrue when made.” *In re VeriFone Sec. Litig.*, 11 F.3d at 871. Mere “allegations  
 25 that defendants should have anticipated future events and made certain disclosures earlier than  
 26 they actually did do not suffice to make out a claim of securities fraud.” *Operating Local 649*  
 27 *Annuity Trust Fund v. Smith Barney Fund Mgmt. LLC*, 595 F.3d 86, 92–93 (2d Cir. 2010). It is  
 28 “clearly insufficient for plaintiffs to say that [a] later, sobering revelation[ ] make[s][an] earlier,



1 cheerier statement a falsehood.” *Yourish v. Cal. Amplifier*, 191 F.3d 983, 997 (9th Cir. 1999)  
 2 (alterations in original). Moreover, it is similarly well-settled in the Ninth Circuit that “fraud by  
 3 hindsight is not actionable.” *Ronconi*, 253 F.3d at 430 n.12 (internal quotation marks omitted).

4 Defendants argue that Plaintiffs have alleged no facts that suggest that the alleged  
 5 misstatements were false when they were made, and they are instead improperly pleading fraud  
 6 by hindsight. Plaintiffs argue that Defendants made materially false and misleading statements  
 7 during the Class Period regarding: (i) the operations of the Lewis leach pad; (ii) Allied’s cash  
 8 position and access to capital; (iii) the mine expansion; and (iv) Allied’s financial guidance.

#### 9 **i. Operations of the Lewis Leach Pad**

10 Plaintiffs allege that throughout the Class Period, Defendants represented that Allied had  
 11 overcome any operational issues at the Lewis leach pad and production was going well and that  
 12 these statements were all false when made. For example, Plaintiffs point to statements like  
 13 Allied “is confident that the challenges we have encountered with heap leach operation are short  
 14 term in nature” (Jan. 18 press release), Allied was “beyond that now and production is looking  
 15 pretty good” (Feb. 25 conference call), and “[w]e’re comfortable that we can get the recoveries  
 16 that we want out of the ore” (April 9 conference call) as false and misleading when made. They  
 17 also identify statements by confidential witnesses (“CW”) and statements by Randy Buffington  
 18 (“Buffington”) in July and August that a significant portion of the ore placed on the Lewis leach  
 19 pad in late 2012 and early 2013 had not been properly leached because of infrastructure  
 20 problems. For example, CW3 and CW4 indicated that an inadequate supply of fresh water was  
 21 an ongoing and serious problem. They argue this shows that operational issues were a concern  
 22 and that this is confirmed when Buffington stated in August that a lack of fresh water was an  
 23 important reason why ore placed on the Lewis leach pad did not get leached.

24 Defendants respond that they were aware of operational problems and disclosed them  
 25 throughout the Class Period. They point to statements like “we got too aggressive on how  
 26 quickly we thought we could see this breakthrough on all of our ore ... I mean, it’s not good”  
 27 (Jan. 18 conference call), “performance at the Hycroft Mine [has been] below expectations for  
 28 some time” (March 27 press release), there’s a “lot of work to do on the site” and Allied’s



1 “biggest problem” was the “solution to ore ratio” (April 9 conference call), and Allied was “in  
2 need of excess lime during the quarter” and there was a “big increase in the stockpiles” of  
3 unprocessed ore due to the low “solution to ore ratio” (May 1 conference call) as evidence that  
4 they continuously disclosed issues to investors. They further note that Plaintiffs acknowledge  
5 that disclosures were made about the issues at the Lewis leach pad on April 30 and May 1.  
6 Moreover, in the August 6 conference call, Buffington explains that Defendants did not  
7 understand the full extent of the issues with the Lewis leach pad until “late May and early June.”  
8 This is confirmed by CW1, who states that in an attempt to identify the cause of the low recovery  
9 at the Lewis leach pad, Allied performed sonic drilling, which took place in June and July 2013.  
10 The full results were not yet known by the time CW1 left Allied in August 2013.

11 Plaintiffs have not adequately alleged that Defendants’ statements were false when made.  
12 The mere fact that Defendants made statements, which in retrospect, may have been wrong or  
13 overly optimistic, are not facts “that would support an inference that the company’s more  
14 optimistic [statements] were known to be false or misleading at the time by the people who made  
15 them.” *Ronconi*, 253 F.3d at 430; *see also In re VeriFone*, 11 F.3d at 871 (“The fact that [a]  
16 prediction proves to be wrong in hindsight does not render the statement untrue when made.”).  
17 The Defendants argue that the company did not discover the full extent of operation issues until  
18 late May and early June and that the issues with the tubing on the Lewis leach pad were not  
19 discovered until late in the second quarter. This position is supported by Plaintiffs’ own  
20 confidential witness. CW1 states that he learned recovery at the Lewis leach pad was lower than  
21 expected in late May 2013 and performed sonic drilling in June and July of 2013 to attempt to  
22 identify the cause of the problem, indicating that the full extent of the problem was not known  
23 until well after the first “partial disclosure” of the leaching problems on April 30 and May 1,  
24 2013. Moreover, to meet their heightened pleading standard, Plaintiffs must “set forth facts  
25 explaining why the difference between the earlier and the later statements is not merely the  
26 difference between two permissible judgments, but rather the result of a falsehood.” *In re*  
27 *GlenFed, Inc. Sec. Litig.*, 42 F.3d 1541, 1548 (9th Cir. 1994) (en banc), superseded by statute on  
28 other grounds as stated in *SEC v. Todd*, 642 F.3d 1207, 1216 (9th Cir. 2011). Plaintiffs have not

1 done this. Their confidential witnesses either support the idea that the severity of the problems  
2 with the Lewis leach pad became known gradually over time or rely on general accusations that  
3 “everybody knew.” Unreliable hearsay and conclusory assertions do not demonstrate that a  
4 confidential witness is reliable. *Zucco Partners*, 552 F.3d at 981. Therefore, Plaintiffs have  
5 failed to support the idea that Defendants’ statements during the Class Period were false at the  
6 time they were made.

7 **ii. Cash Position and Access to Capital**

8 Plaintiffs argue that during the Class Period, Defendants falsely represented that Allied  
9 had sufficient cash-on-hand and access to capital to fund its operations and the Hycroft mine  
10 expansion. They highlight alleged misrepresentations like “Management still believes that we  
11 can fund this expansion with cash on hand ... We’re not looking at equity” (Feb. 25 conference  
12 call), “We have adequate funding in place. We would like to build ourselves some cushion.  
13 We’re in no hurry to build that cushion. We have ample time to do so and we would do that with  
14 the non-equity funding sources”) (April 9 conference call), “There is absolutely no need – there  
15 will not be an equity issue” (April 9 conference call), and “We believe that cash flow from our  
16 ongoing business, when combined with our other sources of liquidity ... will be sufficient over at  
17 least the next twelve months to meet operational needs, make capital expenditure, invest in the  
18 business and service debt due” (Form 10-Q). Plaintiffs argue that these statements are rendered  
19 false by Allied’s secondary public offering on May 1, 2013, and that this is supported by CW2’s  
20 assertions of ongoing cash flow issues apparent as early as March 2013. For example, CW2  
21 states that Allied raided the construction budget to keep the mine operational and failed to timely  
22 pay a developer in April 2013.

23 Defendants respond that their representations were not actionable misstatements, but  
24 statements that are consistent with their evolving understanding of the business challenges and  
25 changing market conditions they faced. They argue that this is consistent with CW2’s statements  
26 that Allied was short on cash as early as March and their cash position worsened in late April.  
27 Defendants stated that as they continued to experience operational issues in late April and the  
28 price of gold declined, they were forced to raise money in the markets rather than rely on cash

1 flow from the mine. Robert Buchan (“Buchan”) points this out in the May 1 conference call,  
 2 stating “Clearly, it’s not something I’m happy about. It’s not what I would have liked to have  
 3 done, but I believe it was a smart call” and noting that “A \$200 decline in gold, this had  
 4 obviously a negative impact on our possibility of completing the build without some changes,  
 5 specifically the cash flow anticipated to come from the operation in ’13 and ’14.”

6 Here, Plaintiffs do not sufficiently plead that Defendants’ change in position was the  
 7 result of deliberate falsehoods, as opposed to the exercise of legitimate business judgment. *City*  
 8 *of Roseville Employees’ Ret. Sys. v. Sterling Fin. Corp.*, 963 F. Supp. 2d 1092, 1109 (E.D. Wash.  
 9 2013). While CW2 does allege funding shortages as early as March 2013, this alone is not  
 10 enough to support the idea that Defendants were not being optimistic, but actively lying when  
 11 they stated that the mine expansion could be funded without raising money in the markets.  
 12 Plaintiffs have not alleged any facts that establish that when making those optimistic statements,  
 13 Defendants were not relying on their legitimate business judgment. The “fact that some of these  
 14 decisions and judgments proved later to be wrong is not actionable.” *City of Roseville*, 963 F.  
 15 Supp. 2d at 1109. To establish falsity, a plaintiff must do more than plead fraud by hindsight.

### 16 **iii. The Mine Expansion**

17 Similarly, Plaintiffs allege that Defendants made numerous misleading statements about  
 18 the status of the Hycroft mine expansion. For example, Defendants stated that the expansion  
 19 project was “on track to meet commissioning deadlines” (March 21 press release); the expansion  
 20 was a “doable plan” (April 9 conference call), and “Management still believes that we can fund  
 21 this expansion with cash on hand” (February 25 conference call). They argue that these are  
 22 actionable misrepresentations because Allied was unable to fund or advance the Hycroft mine  
 23 expansion, which they announced would be phased on April 30 and put on hold on August 6.

24 Defendants argue that Plaintiffs establish no specific facts showing that Defendants knew  
 25 of the severity of problems at the Lewis pad before late May and early June, so there is no basis  
 26 to doubt that Defendants believed that they could fund the expansion projects before that time.  
 27 They also note that the dramatic drop in the price of gold was the major reason for the change in  
 28

1 expansion plans, as stated in the August 6, 2013 press release (“stating the decision was made, in  
2 part, in response to “sharp gold and silver price declines during the second quarter”).

3 As detailed above, Plaintiffs have not alleged sufficient facts to demonstrate that  
4 Defendants were aware of the severity of the problems at the Lewis leach pad before they made  
5 their alleged corrections. While Defendants did make optimistic statements about their ability to  
6 complete the mine expansion, Plaintiffs have not sufficiently alleged facts to show that their  
7 statements went beyond optimism based on their legitimate business judgment and into the realm  
8 of falsehood. “Honest optimism followed by disappointment is not the same as lying or  
9 misleading with deliberate recklessness.” *Ronconi*, 253 F.3d at 432.

10 **iv. Allied’s Financial Guidance**

11 Plaintiffs also argue that during the Class Period, Defendants maintained favorable  
12 financial guidance but failed to inform the market of the impact of Allied’s constrained cash flow  
13 and elevated costs. They note that at the end of the Class Period, Defendants disclosed that  
14 annual production would be lower than their previous representations.

15 Defendants respond that Plaintiffs point to no facts suggesting that Defendants did not  
16 believe the projections were true when they made them and that the only specific fact they allege  
17 is that Defendants revised their production projections downward, contradicting their earlier  
18 projections.

19 Here, Plaintiffs do not provide the underlying facts necessary to satisfy their heightened  
20 pleading standard. The only real facts Plaintiffs allege to show that Defendants’ financial  
21 projections were false when made was that they were later revised downward. The mere fact  
22 that Defendants revised their projections isn’t enough to sustain a securities action. “The fact  
23 that [a] prediction proves to be wrong in hindsight does not render the statement untrue when  
24 made.” *In re VeriFone*, 11 F.3d at 871. It is “clearly insufficient for plaintiffs to say that [a]  
25 later, sobering revelation[ ] make[s][an] earlier, cheerier statement a falsehood,” and that is  
26 essentially what Plaintiffs are arguing here. *Yourish*, 191 F.3d at 997 (alterations in original).

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**b. Puffery**

In the Ninth Circuit, “vague, generalized assertions of corporate optimism or statements of ‘mere puffing’ are not actionable material misrepresentations under federal securities laws” because no reasonable investor would rely on such statements. *In re Impac Mortg. Holdings, Inc.*, 554 F.Supp.2d 1083, 1096 (C.D. Cal. 2008) (citing *Glen Holly Entm’t, Inc. v. Tektronix, Inc.*, 352 F.3d 367, 379 (9th Cir. 2003)); *In re Cutera Sec. Litig.*, 610 F.3d 1103, 1111 (9th Cir. 2010) (“[P]rofessional investors, and most amateur investors as well, know how to devalue the optimism of corporate executives.”). This is because “[w]hen valuing corporations, ... investors do not rely on vague statements of optimism like ‘good,’ ‘well-regarded,’ or other feel good monikers.” *In re Cutera*, 610 F.3d at 1111; *see also In re iPass, Inc. Sec. Litig.*, No. C 05–00228 MHP, 2006 WL 496046, at \*4 (N.D. Cal. Feb. 28, 2006) (generalized statements of optimism are not actionable because they are “‘not capable of objective verification,’” and “‘lack[ ] a standard against which a reasonable investor could expect them to be pegged.’”) (quoting *Grossman v. Novell, Inc.*, 120 F.3d 1112, 1119 (10th Cir. 1997)). Thus, for example, a court has held not actionable as “mere puffery” statements that “[w]e are very pleased with the learning from our pilot launch,” “so far we’re getting really great feedback,” and “we are very pleased with our progress to date.” *Wozniak v. Align Tech., Inc.*, No. C 09–3671 MMC, 2012 WL 368366, at \*4–5 (N.D. Cal. Feb. 3, 2012). Likewise, “statements projecting ‘excellent results,’ a ‘blowout winner’ product, ‘significant sales gains,’ and ‘10% to 30% growth rate over the next several years’” have been held not actionable as mere puffery. *In re Cornerstone Propane Partners, L.P. Sec. Litig.*, 355 F. Supp. 2d 1069, 1087 (N.D. Cal. 2005); *see also In re Copper Mountain Sec. Litig.*, 311 F. Supp. 2d 857, 868–89 (N.D. Cal. 2004) (“run-of-the-mill” statements such as “business remained ‘strong’ ” are not actionable under § 10(b)); *In re LeapFrog Enter., Inc. Sec. Litig.*, 527 F. Supp. 2d 1033, 1050 (N.D. Cal. 2007) (vague statements such as “This is going to be a very big second half for us,” “Our underlying sell-through at the retail level remained very strong throughout the third quarter,” “consumer demand for our learning products is more vibrant than ever,” and “We are pleased with our progress” were not actionable under § 10(b)); *City of Royal Oak Ret. Sys. v. Juniper Networks, Inc.*, 880 F.Supp.2d 1045, 1064 (N.D. Cal.

1 2012) (statements that “[b]oth Verizon and AT&T are strong partners,” company has “strong  
 2 demand metrics and good momentum” and “our demand indicators are strong, our product  
 3 portfolio is robust” are unactionable statements of corporate optimism).

4 Defendants argue that many of the statements at issue here are actually inactionable  
 5 examples of corporate puffery such as “[w]e believe we are on track to meet ... production  
 6 guidance” (April 8 press release), “I’ve seen nothing that concerns me” (April 9 conference call),  
 7 and “I have a lot of confidence in the people that we have doing this project” (April 9 conference  
 8 call). Plaintiffs respond that because the misrepresentations implicated critical aspects of the  
 9 Company’s operations and were specifically intended to induce reliance, they were taken out of  
 10 the realm of non-actionable puffery.

11 “When determining whether statements amounted only to puffery, the court must analyze  
 12 the context in which the statements were made.” *In re Bridgepoint Educ., Inc. Sec. Litig.*, No.  
 13 3:12-CV-1737 JM (WMC), 2013 WL 5206216, at \*17 (S.D. Cal. Sept. 13, 2013). Thus, even a  
 14 statement of opinion or an expression of corporate optimism may be deemed actionable in  
 15 certain circumstances because “there is a difference between enthusiastic statements amounting  
 16 to general puffery and opinion-based statements that are anchored in ‘misrepresentations of  
 17 existing facts.’” *In re Bank of Am. Corp. Sec., Derivative, & ERISA Litig.*, 757 F. Supp. 2d 260,  
 18 310 (S.D.N.Y. 2010) (quoting *Novak v. Kasaks*, 216 F.3d 300, 315 (2d Cir. 2000)); *see also*  
 19 *Casella v. Webb*, 883 F.2d 805, 808 (9th Cir. 1989) (“What might be innocuous ‘puffery’ or mere  
 20 statement of opinion standing alone may be actionable as an integral part of a representation of  
 21 material fact when used to emphasize and induce reliance upon such a representation”).  
 22 Accordingly, the courts do not evaluate the statements in a vacuum by “plucking the statements  
 23 out of their context to determine whether the words, taken per se, are sufficiently ‘vague’ so as to  
 24 constitute puffery,” but rather examine the entire statement and its circumstances to determine if  
 25 it is actionable. *Scratchfield v. Paolo*, 272 F. Supp. 2d 163, 176 (D.R.I. 2003).

26 Here, while Plaintiffs may have relied on these statements, the fact remains that they  
 27 represent the “feel good speak that characterizes non-actionable puffing.” *Police Ret. Sys. of St.*  
 28 *Louis v. Intuitive Surgical, Inc.*, 759 F.3d 1051, 1060 (9th Cir. 2014) (internal quotation

removed). Statements like “we believe we are on track” and “I have a lot of confidence in the people that we have doing that project” are the sort of optimistic, subjective assessments that do not amount to a securities violation. *See, e.g., In re Cutera*, 610 F.3d at 1112 (“[N]one of our employees is represented by a labor union, and we believe our employee relations are good” and “everything is clicking [for the 1990s] ... new products are coming in a wave, not in a trickle ... old products are doing very well”). While the context in which the statements are made does play a role in determining if they form a basis for a securities fraud claim, the situation here is not like the cases where such statements were found actionable. In *Warshaw*, “the company, whose financial success depended on FDA approval ... made repeated assurances that FDA approval was ‘imminent’ ” when it knew that it was not. *Syntex Corp. Sec. Litig.*, 95 F.3d at 927 (analyzing *Warshaw*). So too in *Fecht v. Price Co.*, 70 F.3d 1078 (9th Cir.1995), “where company officials had made statements that the company's expansion of its retail warehouse operations was successful and that the expansion increased the company's prospects for earnings,” when the officials knew that the expansion had failed. *Syntex Corp. Sec. Litig.*, 95 F.3d at 927 (analyzing *Fecht*). Here, Plaintiffs have not alleged facts that show that Defendants knew these statements to be false when they were made. Further, Defendants continuously disclosed that there were difficulties at the Lewis leach pad. “In context, any reasonable investor would have understood [the company’s] statements as mere corporate optimism” because “the market already knew” of the difficulties facing the company. *Intuitive Surgical*, 759 F.3d at 1060. Moreover, while Plaintiffs argue that the statements were intended to induce reliance, that is not a relevant inquiry here. “Absent an actionable misstatement, reliance does not come into play.” *Intuitive Surgical*, 759 F.3d at 1060.

### **c. Safe Harbor**

Under the PSLRA “Safe Harbor” Provision, “forward-looking statements” are not actionable as a matter of law if they are identified as such and accompanied by “meaningful cautionary statements identifying important facts that could cause actual results to differ materially from those in the forward looking statement.” *See* 15 U.S.C. § 78u–5(c)(1)(A)(i). A forward-looking statement is “any statement regarding (1) financial projections, (2) plans and



1 objectives of management for future operations, (3) future economic performance, or (4) the  
 2 assumptions ‘underlying or related to’ any of these issues.” *No. 84 Employer–Teamster Joint*  
 3 *Council Pension Trust Fund v. Am. W. Holding Corp.*, 320 F.3d 920, 936 (9th Cir. 2003) (citing  
 4 15 U.S.C. § 78u5 (i)). Similarly, a present tense statement can be covered by the safe harbor if,  
 5 as a whole, the challenged statements relate to “future expectations and performance.” *Intuitive*  
 6 *Surgical*, 759 F.3d at 1058. “[I]f a forward-looking statement is identified as such and  
 7 accompanied by meaningful cautionary statements, then the state of mind of the individual  
 8 making the statement is irrelevant, and the statement is not actionable regardless of the plaintiff’s  
 9 showing of scienter.” *In re Cutera*, 610 F.3d at 1112. Alternatively, if a forward-looking  
 10 statement is not identified as such or is unaccompanied by meaningful cautionary statements,  
 11 then the statement is actionable only if the plaintiff proves that the forward-looking statement  
 12 “was made with actual knowledge by that person that the statement was false or misleading.” 15  
 13 U.S.C. § 78u–5(c)(1)(B).

14 Congress has directed courts to consider all information and documents relevant to a  
 15 determination of whether a defendant has given adequate warnings for safe harbor protection.  
 16 The safe harbor provision of the PSLRA provides that “the court shall consider any statement  
 17 cited in the complaint and any cautionary statement accompanying [a] forward-looking  
 18 statement, which [is] not subject to material dispute, cited by the defendant.” 15 U.S.C. § 78u–  
 19 5(e) (emphasis added). Furthermore, with regard to oral forward-looking statements, the safe  
 20 harbor provision explicitly provides that a written, identified, and “readily available document”  
 21 may be incorporated by reference. 15 U.S.C. § 78u–5(c)(2)(B). Any document either “filed with  
 22 the Commission or generally disseminated shall be deemed to be readily available.” 15 U.S.C. §  
 23 78u–5(c)(3). While the safe harbor provision does not explicitly provide for incorporation by  
 24 reference for written forward-looking statements, numerous courts have concluded that  
 25 cautionary language is not required to be in the same document as the allegedly false or  
 26 misrepresented statement. *See e.g., Miller v. Champion Enter. Inc.*, 346 F.3d 660, 677–78 (6th  
 27 Cir. 2003) (letter alleged to contain false statements contained meaningful cautionary language  
 28 when it referred to risk disclosures in company’s Form 10–K); *Grossman*, 120 F.3d at 1122

1 (“[W]hen actually faced with the issue, courts have not required cautionary language to be in the  
2 same document as the alleged misstatement or omission.”); *Employers Teamsters Local Nos. 175*  
3 *and 505 Pension*, 353 F.3d at 1132–33 (finding meaningful cautionary language accompanied  
4 oral forward-looking statements where, during a conference call, the company referred potential  
5 investors to its Form 10–K filed the previous September); *In re PEC Solutions Sec. Litig.*, 2004  
6 WL 1854202, at (E.D. Va. 2004) (forward-looking statements in press release protected by safe  
7 harbor where press release incorporated by reference the company's 2002 Form 10–K); *Stavros*  
8 *v. Exelon Corp.*, 266 F. Supp. 2d 833, 844 (N.D. Ill. 2003) (finding safe harbor applicable where  
9 “the documents containing the projections at issue specifically reference other factors listed in ...  
10 filings with the SEC”); *In re Humphrey Hospitality Trust, Inc. Sec. Litig.*, 219 F.Supp.2d 675,  
11 684 (D. Md. 2002) (finding safe harbor protections applied where press release referenced  
12 cautionary factors listed in company's SEC filings).

13 Defendants argue that the alleged misstatements are inactionable as forward-looking  
14 statements subject to the safe harbor. For example, they point to statements like “We are on  
15 track to meet commissioning deadlines for the north leach pad (late second quarter), Merrill-  
16 Crowe plant (third quarter) and gyratory crusher (mid-third quarter)” (March 21 press release),  
17 “Sales in the first half of the year are expected to be approximately 90,000 to 100,000 ounces of  
18 gold, increasing in the second half of the year” (Jan. 18 press release), and “as we bring up the  
19 pH, we expect to get back to what I’m going to call normal leach kinetics and see more gold and  
20 silver come off the pads” (May 1 conference call) as statements that are forward-looking on their  
21 face and therefore inactionable. Defendants next argue that many of the present tense statements  
22 are also protected by the safe harbor because as a whole they relate to future expectations and  
23 performance. For example, they point to statements like “[W]e’re already seeing the fixes that  
24 are required. As I said in the press release, the mine is starting to perform as it should.” (April 9  
25 conference call), “Management believes that the [Mill] can be funded with current cash balances,  
26 an undrawn revolving line of credit for \$120 million, capital lease financing, and operating cash  
27 flow.” (March 21 press release), and “We believe we are on track to meet previous disclosed six  
28 month production guidance of 90,000 to 100,000 ounces of gold” (April 8 press release).

1 Finally, they note that every one of the alleged misstatements was accompanied by meaningful  
 2 cautionary statements. Every conference call began by referring listeners to the cautionary  
 3 statements included in Allied's press releases and on the company's website. Additionally, the  
 4 press releases included meaningful cautionary language and further referred investors to the  
 5 cautionary material discussed in Allied's SEC filings. Finally, Defendants note that even if the  
 6 forward-looking statements had not uniformly been accompanied by cautionary language, those  
 7 statements are still inactionable absent a showing of actual knowledge of falsity.

8 Plaintiffs argue that the safe harbor provision does not insulate Defendants from liability  
 9 because statements of past or present facts are not covered by the safe harbor provision, even  
 10 when they are inextricably tied with forward-looking statements. However, this is not an  
 11 accurate description of the current law. The Ninth Circuit recently confronted a similar  
 12 argument in *Intuitive Surgical*, in which the plaintiffs argued that in the case of statements which  
 13 mixed non-forward-looking statements with forward-looking ones, the former were still  
 14 actionable. 759 F.3d at 1059. The *Intuitive Surgical* court stated it "need not resolve whether  
 15 the safe harbor covers non-forward-looking portions of forward-looking statements because,  
 16 examined as a whole, the challenged statements related to future expectations and performance."  
 17 *Id.* (citing *In re Cutera*, 610 F.3d at 1111) (emphasis added). Based on this, the Ninth Circuit  
 18 held two arguably mixed statements to be protected by the PSLRA Safe Harbor. First, when  
 19 asked about lower capital expenditures by hospitals, one of the individual defendants in *Intuitive*  
 20 *Surgical*—an executive at a manufacturer of robotic surgical devices—stated: "At the present  
 21 time, we don't have any indicators that tell us that's the case. But we're early into this." *Id.* at  
 22 1059 (internal quotation marks omitted). The Ninth Circuit held that, examined as a whole, the  
 23 statement is "properly classified as an assumption 'underlying or related to' projections for lower  
 24 hospital expenditures on Systems." *Id.* (citing *No. 84 Emp'r-Teamster*, 320 F.3d at 936).  
 25 Second, when asked if anything in the "external environment" made the executives nervous  
 26 about purchases in the next twelve months, another individual defendant responded: "[T]here's  
 27 always a decision within a hospital of how do they prioritize their capital investment ... I think  
 28 we come up typically fairly high on that priority list.... We aren't hear[ing] anything that causes

1 us any significant concern ... no change from last quarter, I guess....” The Ninth Circuit held that  
2 “[i]n context, this statement is properly understood as regarding [the individual defendant’s]  
3 expectations of the future impact of the external economic environment on Intuitive” and  
4 therefore was immunized under the PSLRA Safe Harbor. *Id.* Accordingly, to the extent that any  
5 of the statements at issue in the instant lawsuit contain both forward-looking and non-forward-  
6 looking statements, the Court examines them as a whole to determine whether they relate to  
7 future expectations and performance.

8 The mixed statements here are ultimately forward looking. For example, “Management  
9 believes that the [Mill] can be funded with current cash balances, an undrawn revolving line of  
10 credit for \$120 million, capital lease financing, and operating cash flow” is a statement that is a  
11 projection about Allied’s future ability to finance the Mill and relates to the assumption that cash  
12 flow will be as expected.

13 Next, Plaintiffs argue that the challenged misstatements were not accompanied by  
14 meaningful cautionary statements. They argue that the cautionary statements were boilerplate  
15 and warned of risks that were already occurring. However, securities law does not “demand  
16 prescience” and “[a]s long as the [defendant] reveals the principal risks, the fact that some other  
17 event caused problems cannot be dispositive.” *Asher v. Baxter Int’l Inc.*, 377 F.3d 727, 730 (7th  
18 Cir. 2004). Rather, the cautionary statement need only “identify[ ] important factors that could  
19 cause actual results to differ materially from those in the forward-looking statements.” 15 U.S.C.  
20 § 78u–5(c)(1)(A). The cautionary statements contained in Allied’s press releases and SEC  
21 filings were not boilerplate and described factors specifically tailored to the company’s business  
22 such as “risks relating to fluctuations in the price of gold and silver” and “risks related to the  
23 heap leaching process at the Hycroft mine, including but not limited to gold recovery rates, gold  
24 extraction rates, and the grades of ore placed on our leach pads.” As to Plaintiffs’ point that the  
25 cautionary language was insufficient because it remained virtually unchanged as the situation  
26 evolved, this does not matter so long as important factors that could cause results to differ  
27 materially from the forward-looking statements are identified. *In re Quality Sys., Inc. Sec.*  
28 *Litig.*, 60 F. Supp. 3d 1095, 1107 (C.D. Cal. 2014), reconsideration denied (Jan. 5, 2015).

1 “[C]autionary language is not rendered insufficient merely because Defendants utilized similar  
 2 language in their cautionary disclosures throughout the Class Period.” *In re Quality Sys.*, 60 F.  
 3 Supp. 3d at 1107.

## 4 **2. Scienter**

5 Under the PSLRA, a securities fraud complaint must “state with particularity facts giving  
 6 rise to a strong inference that the defendant acted with the required state of mind.” *Gompper*,  
 7 298 F.3d at 895 (citing 15 U.S.C. § 78u–4(b)(2)); *see also Silicon Graphics*, 183 F.3d at 974  
 8 (facts must come closer to demonstrating intent as opposed to mere motive and opportunity).  
 9 Thus, the complaint must allege that the defendants made false or misleading statements either  
 10 intentionally or with deliberate recklessness. *See Silicon Graphics*, 183 F.3d at 974. This court  
 11 considers “whether the total of plaintiffs’ allegations, even though individually lacking, are  
 12 sufficient to create a strong inference that defendants acted with deliberate or conscious  
 13 recklessness.” *Nursing Home*, 380 F.3d at 1230 (quoting *No. 84 Emp’r–Teamster*, 320 F.3d at  
 14 938). In considering whether a strong inference of scienter has been pled, “the court must  
 15 consider all reasonable inferences to be drawn from the allegations, including inferences  
 16 unfavorable to the plaintiffs.” *Gompper*, 298 F.3d at 897 (emphasis in original).

17 The Supreme Court defined “strong inference” in *Tellabs*, concluding that a securities  
 18 fraud complaint will survive a motion to dismiss under Federal Rule of Civil Procedure 12(b)(6)  
 19 “only if a reasonable person would deem the inference of scienter cogent and at least as  
 20 compelling as any opposing inference one could draw from the facts alleged.” 127 S.Ct. at 2510.  
 21 Thus, a court reviewing a complaint’s scienter allegations under the PSLRA must “consider the  
 22 complaint in its entirety, as well as other sources courts ordinarily examine when ruling on Rule  
 23 12(b)(6) motions to dismiss, in particular, documents incorporated into the complaint by  
 24 reference, and matters of which a court may take judicial notice.” *Id.* at 2509. The court must  
 25 determine whether “all of the facts alleged, taken collectively, give rise to a strong inference of  
 26 scienter, not whether any individual allegation, scrutinized in isolation, meets that standard.” *Id.*  
 27 Finally, when “determining whether the pleaded facts give rise to a ‘strong’ inference of scienter,  
 28 the court must take into account plausible opposing inferences.” *Id.* This “inquiry is inherently

1 comparative.” *Id.* at 2510. A court must compare the malicious and innocent inferences  
2 cognizable from the facts pled in the complaint, and only allow the complaint to survive a  
3 motion to dismiss if the malicious inference is at least as compelling as any opposing innocent  
4 inference. *See id.* at 2510; *see also Metzler*, 540 F.3d at 1066.

5 Plaintiffs argue that their complaint does demonstrate a strong inference of scienter.  
6 First, they argue that the confidential witness accounts demonstrate Defendants’ awareness of the  
7 widespread operational issues at the Lewis pad during the Class Period. Second, they argue that  
8 because the misstatements concerned operations that were critical to Allied, it is reasonable to  
9 infer that Defendants knew they were false when they made them. Third, they argue that sudden,  
10 high-level resignations during the Class Period augment the inference of scienter. Finally, they  
11 argue that Defendants were motivated to commit the fraud in order to raise capital in the SPO to  
12 keep the company afloat and maintain their jobs.

13 Defendants argue that the confidential witness statements affirmatively negate any  
14 inference of scienter, that the core operations argument misses the mark, that the resignations  
15 were not indicative of scienter, and that a generalized assertion of motive is not enough to meet  
16 the heightened pleading requirements.

17 As to the confidential witness statements, Plaintiffs argue that they demonstrate that  
18 Defendants were aware of the operational problems at the Lewis leach pad. For example, several  
19 confidential witnesses made statements that it was “common knowledge” that there were  
20 problems with the water pipes. Defendants argue that the confidential witness accounts are too  
21 contradictory to support a finding of scienter. For example, CW1 stated that the extent of the  
22 issues facing the Lewis leach pad were not known until at least May. Further, Defendants note  
23 that CW5 claimed to have reported that the existing pipes were inadequate in the presence of  
24 Buffington in January 2013, despite Buffington not working there for Allied at the time.

25 Here, the statements by the confidential witnesses do not give rise to a strong inference  
26 that the Defendants acted with the required state of mind. There are contradictions within the  
27 reports of the confidential witnesses on key issues in this case and many of the confidential  
28 witnesses statements as to scienter are simply general allegations that the issues were “common

1 knowledge,” which is not enough. Confidential source statements in a securities fraud complaint  
2 are only useable when they “are not conclusory allegations of fraud, but specific descriptions of  
3 the precise means through which it occurred, provided by persons said to have personal  
4 knowledge of them.” *In re Cabletron Sys., Inc.*, 311 F.3d 11, 30 (1st Cir. 2002). Moreover, the  
5 statements of a confidential witness are disregarded if lacking in specificity or based on hearsay,  
6 rumor, or speculation. *See, In re Hypercom Corp. Sec. Litig.*, 2006 WL 1836181, at \* 5 (D. Ariz.  
7 Jul. 5, 2006) (“[C]onfidential witnesses' unreliable or conclusory allegations will not be  
8 considered”); *Metawave Communications Corp. Sec. Litig.*, 298 F.Supp. 2d 1056, 1070 (W.D.  
9 Wash. 2003) (“[A] shared opinion among confidential witnesses does not necessarily indicate  
10 either falsity or a strong inference of scienter if the allegations themselves are not specific  
11 enough.”). In this case, the confidential witness statements lack corroboration, lack specificity,  
12 and are often conclusory, which is not sufficient to give rise to a strong inference of scienter. *In*  
13 *re Downey Sec. Litig.*, No. CV 08-3261-JFW(RZX), 2009 WL 2767670, at \*10 (C.D. Cal. Aug.  
14 21, 2009).

15       Additionally, Plaintiffs point to the temporal proximity between Defendants’  
16 misstatements and their admissions that there were issues at the mine as circumstantial evidence  
17 of scienter. Temporal proximity of an allegedly fraudulent statement or omission and a later  
18 disclosure can be circumstantial evidence of scienter. *See Berson v. Applied Signal Tech., Inc.*,  
19 527 F.3d 982, 988 n. 5 (9th Cir. 2008) (SEC disclosure two weeks after a misleading statement  
20 “bolsters the inference” that defendants had knowledge when they made the statement).  
21 However, this case is distinguishable from the temporal proximity cases cited by the Plaintiffs.  
22 For example, in *Berson*, the executives said they did not know about a stop-work order, but then  
23 disclosed it in an SEC filing two weeks later. *Id.* Two weeks is a short period of time, much  
24 shorter than the alleged time gap here, and a stop-work order is not something that could be  
25 discovered gradually, like the problems surrounding the Lewis leach pad. Similarly in *Ronconi*,  
26 the court concluded that the “five week period between the optimistic statements and the below-  
27 expectation earnings report is not enough to sustain the complaint.” *Ronconi*, 253 F.3d at 437.  
28 Temporal proximity can bolster a complaint, but it cannot satisfy the requirements of the



1 PSLRA. *Id.* Additionally, as Defendants point out, the timeline is also consistent with their  
2 argument that it took time for them to discover the operational issues at the Lewis leach pad.

3 Plaintiffs also argue that Defendants must have been aware of the operational issues  
4 because the Hycroft mine was Allied's only property, and the Lewis leach pad was one of only  
5 three leach pads. Additionally, Plaintiffs point out that Defendants supervised and oversaw the  
6 progress of the mine expansion.

7 Defendants argue that they were aware of some of the issues, and they reported them as  
8 they became known; however, they simply did not understand the cause of the problems or the  
9 severity of the issues until August.

10 It is inadequate to simply allege that "facts critical to a business's core operations or an  
11 important transaction generally are so apparent that their knowledge may be attributed to the  
12 company and its key officers." *In re Read-Rite Corp. Sec. Litig.*, 335 F.3d 843, 848 (9th Cir.  
13 2003) (quotation and emphasis omitted); *see also DSAM Glob. Value Fund v. Altris Software,*  
14 *Inc.*, 288 F.3d 385, 390 (9th Cir. 2002) ("Thus, mere allegations that an accountant negligently  
15 failed to closely review files or follow GAAP cannot raise a strong inference of scienter.").

16 However, the Ninth Circuit has recognized two exceptions to this general rule, and has  
17 found bare allegations of falsely reported information probative under certain narrow conditions.  
18 *See S. Ferry LP, No. 2 v. Killinger*, 542 F.3d 776, 785 (9th Cir. 2008) (summarizing the  
19 exceptions). Specifically, falsity may itself be indicative of scienter where it is combined with  
20 "allegations regarding management's role in the company" that are "particular and suggest that  
21 the defendant had actual access to the disputed information," and where "the nature of the  
22 relevant fact is of such prominence that it would be 'absurd' to suggest that management was  
23 without knowledge of the matter." *Id.* at 786 (internal quotations and citations omitted).

24 The first exception permits general allegations about "management's role in a corporate  
25 structure and the importance of the corporate information about which management made false  
26 or misleading statements" to create a strong inference of scienter when these allegations are  
27 buttressed with "detailed and specific allegations about management's exposure to factual  
28 information within the company." *Id.* at 785. To satisfy this standard, plaintiffs might include in

1 their complaint “specific admissions from top executives that they are involved in every detail of  
2 the company and that they monitored portions of the company's database,” *id.* (quoting *In re*  
3 *Daou Sys., Inc.*, 411 F.3d 1006, 1022–23 (9th Cir. 2005)), a specific admission from a top  
4 executive that “[w]e know exactly how much we have sold in the last hour around the world,”  
5 *id.* (quoting *Nursing Home*, 380 F.3d at 1231), or other particular “details about the defendants’  
6 access to information within the company.” *Id.*

7 The complaint here does not include the specific admissions described by the Ninth  
8 Circuit. For example, in *Zucco*, the Court concluded that allegations that Digimarc’s  
9 management had access to the purportedly manipulated quarterly accounting numbers, or that the  
10 management analyzed the inventory numbers closely, did not support the inference that  
11 management was in a position to know that such data was being manipulated. *Zucco Partners*,  
12 552 F.3d at 1001. Plaintiffs in this case have not even alleged that much.

13 The second exception to *Read–Rite* permits an inference of scienter where the  
14 information misrepresented is readily apparent to the defendant corporation’s senior  
15 management. Where the defendants “must have known” about the falsity of the information they  
16 were providing to the public because the falsity of the information was obvious from the  
17 operations of the company, the defendants’ awareness of the information’s falsity can be  
18 assumed. *See Berson*, 527 F.3d at 987–89. Nevertheless, reporting false information will only be  
19 indicative of scienter where the falsity is patently obvious—where the “facts [are] prominent  
20 enough that it would be ‘absurd to suggest’ that top management was unaware of them.” *Id.* at  
21 989 (quoting *No. 84 Emp’r–Teamster*, 320 F.3d at 943 n. 21). In *Berson* the court found that the  
22 defendant company’s misrepresentation of the status of stop-work orders was enough to infer  
23 scienter when the four stop-work orders had respectively “halted between \$10 and \$15 million of  
24 work on the company’s largest contract with one of its most important customers,” “halted \$8  
25 million of work,” “caused the company to reassign 50–75 employees,” and “required  
26 [Defendant] to complete massive volumes of paperwork.” *See id.* at 988 n. 5 (quotation marks  
27 omitted).

28 ///

1 Here, there were no such obvious smoking guns as the paperwork or reassignment of a  
2 large number of employees. Even if Defendants noticed the buildup of ore or that problems with  
3 the leach pad could negatively affect their cash position or expansion plans that doesn't mean  
4 they knew why or were wrong to think that the issues could be overcome. In the cases cited by  
5 the Plaintiffs, there was a single, specific, *identified* issue, such as a stop-work order. That is not  
6 the case here. Even Plaintiffs' confidential witnesses have noted that investigation into the  
7 problems surrounding the Lewis leach pad was required, which negates the idea that the falsity  
8 of the information Defendants provided was obvious from the operations of the company.

9 Next, Plaintiffs allege the sudden resignations of Scott Caldwell and Buchan during the  
10 Class Period augment the inference of scienter. Defendants respond that this sort of conclusory  
11 allegation is insufficient to plead scienter and that it is hardly surprising Allied wanted a change  
12 in leadership given the issues the company was experiencing at the time.

13 The law is clear that "a plaintiff must allege sufficient information to differentiate  
14 between a suspicious change in personnel and a benign one," and "[m]ere conclusory allegations  
15 that a financial manager resigns or retires during the class period ... without more, cannot  
16 support a strong inference of scienter." *Zucco Partners*, 552 F.3d at 1002. Plaintiffs' assertions  
17 are conclusory, and they have not alleged any additional facts to show that the resignations are  
18 indicative of scienter. "Absent allegations that the resignation at issue was uncharacteristic when  
19 compared to the defendant's typical hiring and termination patterns or was accompanied by  
20 suspicious circumstances, the inference that the defendant corporation forced certain employees  
21 to resign because of its knowledge of the employee's role in the fraudulent representations will  
22 never be as cogent or as compelling as the inference that the employees resigned or were  
23 terminated for unrelated personal or business reasons." *Zucco Partners*, 552 F.3d at 1002.

24 Finally, Plaintiffs argue that Defendants were motivated to commit fraud in order to raise  
25 \$150 million in the SPO, which they contend was a lifeline necessary to counter hemorrhaging  
26 costs and instill confidence in the market that the expansion was on track. Plaintiffs further  
27 argue that without the cash, Allied would have gone into bankruptcy even sooner, jeopardizing  
28 the jobs of top management, and thus Defendants were motivated to commit fraud to preserve

1 their careers and the company itself. Defendants respond that a generic desire to raise capital is  
 2 insufficient to demonstrate scienter.

3 Courts are clear that “the motive to secure financing is a normal business objective, and  
 4 therefore ... it cannot by itself establish scienter.” *In re Wet Seal, Inc. Sec. Litig.*, 518 F. Supp.  
 5 2d 1148, 1174 (C.D. Cal. 2007). Plaintiffs’ allegations as to Defendants’ motive are conclusory,  
 6 and they fail to allege any facts to support the idea that preservation instinct is motivated  
 7 management to commit fraud. Allegations that “merely charge that executives aim to prolong  
 8 the benefits they hold” are, standing alone, insufficient to demonstrate the necessary strong  
 9 inference of scienter. *Shields v. Citytrust Bancorp, Inc.*, 25 F.3d 1124, 1130 (2d Cir. 1994). For  
 10 this reason assertions that a corporate officer or director committed fraud in order to retain an  
 11 executive position, simply do not, in themselves, adequately plead motive. *Phillips v. LCI Int’l,*  
 12 *Inc.*, 190 F.3d 609, 622 (4th Cir. 1999).

13 Finally, the Court is required to “consider the complaint in its entirety to determine  
 14 whether all of the facts alleged, taken collectively, give rise to a strong inference of scienter ...  
 15 tak[ing] into account plausible opposing inferences.” *Zucco Partners*, 552 F.3d at 1006.

16 Here, Plaintiffs have not demonstrated that as a whole, their allegations are more  
 17 plausible than innocent alternatives. *Zucco Partners*, 552 F.3d at 1007. Overall, Plaintiffs allege  
 18 that Defendants knew the extent of the issues at the Lewis leach pad throughout the Class Period,  
 19 this knowledge motivated the resignations of two high level executives, and Defendants were  
 20 motivated to lie by a desire to raise money in an SPO necessary to keep the company afloat and  
 21 maintain their jobs. However, given all that is before the court, a reasonable inference is that it  
 22 was likely that it took Allied time to fully understand the magnitude of the problems affecting the  
 23 Lewis leach pad, and management acted accordingly. Plaintiff’s allegations, taken together, are  
 24 not “as cogent or compelling” as this plausible alternative inference. *Zucco Partners*, 552 F.3d  
 25 at 1007.

### 26 **3. Loss Causation**

27 A securities fraud plaintiff must demonstrate loss causation. *Daou*, 411 F.3d at 1025 (9th  
 28 Cir. 2005). To prove loss causation, the plaintiff must demonstrate a causal connection between

1 the deceptive acts that form the basis for the claim of securities fraud and the injury suffered by  
 2 the plaintiff. *Id.*; see also *Dura Pharms.*, 125 S.Ct. at 1633 (“[P]laintiff [must] prove that the  
 3 defendant's misrepresentation (or other fraudulent conduct) proximately caused the plaintiff's  
 4 economic loss.”). “A misrepresentation is ‘the proximate cause of an investment loss if the risk  
 5 that caused the loss was within the zone of risk concealed by the misrepresentations.’” *In re*  
 6 *Omnicom Grp., Inc. Sec. Litig.*, 597 F.3d 501, 513 (2d Cir. 2010) (quoting *Lentell v. Merrill*  
 7 *Lynch & Co.*, 396 F.3d 161, 173 (2d Cir. 2005)). Therefore, “to plead loss causation, the  
 8 complaint[ ] must allege facts that support an inference that [defendant's] misstatements and  
 9 omissions concealed the circumstances that bear upon the loss suffered such that plaintiffs would  
 10 have been spared all or an ascertainable portion of that loss absent the fraud.” *Lentell*, 396 F.3d  
 11 at 175. A plaintiff is not required to show “that a misrepresentation was the sole reason for the  
 12 investment's decline in value” in order to establish loss causation. See *Robbins v. Koger Props.,*  
 13 *Inc.*, 116 F.3d 1441, 1447 n. 5 (11th Cir. 1997) (emphasis added). “[A]s long as the  
 14 misrepresentation is one substantial cause of the investment's decline in value, other contributing  
 15 forces will not bar recovery under the loss causation requirement” but will play a role “in  
 16 determining recoverable damages.” *Id.* A plaintiff must plead loss causation “with sufficient  
 17 specificity to enable the court to evaluate whether the necessary causal link exists” between the  
 18 material misrepresentations or omissions and the economic loss. *Teachers' Ret. Sys. of LA v.*  
 19 *Hunter*, 477 F.3d 162, 186 (4th Cir. 2007). The heightened pleading standard of “Rule 9(b)  
 20 applies to all elements of a securities fraud action, including loss causation.” *Oregon Pub.*  
 21 *Employees Ret. Fund v. Apollo Grp. Inc.*, 774 F.3d 598, 605 (9th Cir. 2014).

22 Plaintiffs argue that the Complaint adequately alleges that they bought shares of Allied at  
 23 an inflated price due to Defendants’ deceptive conduct, that the stock price fell when the truth  
 24 was revealed, and that this caused them an economic loss. They note that Allied’s stock price  
 25 dropped after the first “partial reveal” at the end of April. While Allied’s stock actually  
 26 increased after the July 22 “partial disclosure,” Plaintiffs argue that this was because of surging  
 27 gold prices. Finally, they note that Allied’s stock price plummeted after the “final reveal” in  
 28

1 August. Plaintiffs further argue that they do not need to specifically identify what portion of the  
2 drop in stock price was caused by falling gold prices and what portion was caused by the fraud.

3 Defendants argue that Plaintiffs' argument cannot be sustained because Allied's stock  
4 price actually rose after the July 22 disclosure, and the sharp decline in the price of gold was the  
5 most likely reason for the drop in Allied's stock price in August.

6 To establish loss causation, "the plaintiff must demonstrate a causal connection between  
7 the deceptive acts that form the basis for the claim of securities fraud and the injury suffered by  
8 the plaintiff." *Daou*, 411 F.3d at 1025. The misrepresentation need not be the sole reason for the  
9 decline in value of the securities, but it must be a "substantial cause." *In re Gilead*, 536 F.3d at  
10 1055-56. Here, the price of gold is a primary driver of Allied's stock price. After the July 22  
11 disclosure, Allied's stock price rose, along with the price of gold. After the August 6 disclosure,  
12 Allied's stock price fell, along with the price of gold. Plaintiffs have not offered an adequate  
13 explanation as to why Allied's stock price was tied to the price of gold after one disclosure but  
14 not the other. Because of this, Plaintiffs have not adequately alleged that the alleged material  
15 misrepresentations were a substantial cause in the decline in value of their stock, and they have  
16 not made a case for loss causation.

### 17 **C. Section 20(a) Claim**

18 Section 20(a) of the 1934 Act provides a basis for holding individuals and businesses  
19 liable for acts of securities fraud if they control other individuals or businesses that violate the  
20 securities laws:

21 Every person who, directly or indirectly, controls any person liable under any  
22 provision of this chapter or of any rule or regulation thereunder shall also be liable  
23 jointly and severally with and to the same extent as such controlled person to any  
person to whom such controlled person is liable....

24 15 U.S.C. § 78t. To establish liability under section 20(a), a plaintiff must demonstrate  
25 "a primary violation of federal securities law" and that "the defendant exercised actual power or  
26 control over the primary violator." *No. 84 Emp'r-Teamster*, 320 F.3d at 945 (quoting *Howard v.*  
27 *Everex Sys., Inc.*, 228 F.3d 1057, 1065 (9th Cir. 2000)) (quotation marks omitted); *Paracor*  
28 *Finance., Inc. v. Gen. Elec. Capital Corp.*, 96 F.3d 1151, 1161 (9th Cir. 1996). This inquiry is

1 normally an “intensely factual question.” *Paracor Finance*, 96 F.3d at 1161 (quoting *Arthur*  
2 *Children's Trust v. Keim*, 994 F.2d 1390, 1396 (9th Cir.1993)). Section 20(a) claims may be  
3 dismissed summarily, however, if a plaintiff fails to adequately plead a primary violation of  
4 section 10(b). *See In re VeriFone*, 11 F.3d at 872.

5 As Plaintiffs’ have failed to adequately plead a primary violation of Section 10(b), their  
6 Section 20(a) claim fails as well.

7 **IV. Conclusion**

8 IT IS THEREFORE ORDERED that Defendants’ Motion to Dismiss (ECF No. 103) is  
9 GRANTED. Plaintiffs’ Complaint shall be DISMISSED without prejudice. Plaintiffs shall have  
10 thirty (30) days in which to file an amended complaint.

11 DATED this 8th day of August, 2016.



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14 LARRY R. HICKS  
15 UNITED STATES DISTRICT JUDGE  
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